United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2025

To be argued by
RHONDA AMKRAUT BAYER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIGOVERTO GARCIA,

Appellant,

-against-

VITO TERNULLO, Superintendent, Matteawan State Hospital,

Appellee.

Docket No. 76-2025

B
B/S

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

Question Presented

Once Miranda warnings have been completely given and the defendant has knowingly waived his rights, must the warnings be repeated any time interrogation resumes after interruption?

Preliminary Statement

In this habeas corpus proceeding, Rigoverto Garcia appeals from the decision and order of the United States District Court for the Southern District of New York (Brieant, J.) rendered December 11, 1975 dismissing the

petition which claimed that the state court erred in ruling that certain inculpatory statements made by petitioner were admissible in that he was not properly advised of his rights to remain silent and to the presence of counsel and that he did not voluntarily waive his right to remain silent.

The admissibility of these inculpatory statements is the issue on this appeal.

Statement of the Case

On May 28, 1972, at about 5 a.m., in the vicinity of 163rd Street and Westchester Avenue, petitioner, Rigoverto Garcia, shot Jose Martinez in the throat with a gun causing serious injury.

On June 5, 1973 petitioner was indicted by the Bronx County Grand Jury and charged with Attempted Murder, two counts of Robbery in the first degree, Grand Larceny in the third degree, Possession of a Weapon as a Felony and Assault in the first degree.

After a pre-trial hearing held on June 4-6, 1973, the Supreme Court, Bronx County (Sullivan, J.) denied petitioner's motions to suppress the complainant's identification and the statements made by him while in police custody.

Petitioner proceeded to trial. However, on June 7, 1973, after three jurors were selected, petitioner offered to withdraw his plea of not guilty and enter a plea of guilty to assault in the first degree in full satisfaction of the indictment. The court accepted the plea and on June 28, 1973 sentenced petitioner to a term of imprisonment not to exceed ten years.

Prior Proceedings

A. State Court

(1) The Pre-Trial Hearing

Prior to petitioner's trial he moved to suppress the complainant's identification and the statements made by him while in police custody. A pre-trial hearing was held on June 4-6, 1973 in Supreme Court, Bronx County (Sullivan, J.).

The People called two witnesses:

JOSE MARTINEZ, the complaining witness, testified that on May 28, 1972 at approximately 5 a.m. in the vicinity of 163rd Street and Westchester Avenue, he was approached by petitioner who was shortly joined by two other men who had been across the street. As petitioner approached he took out a gun in his right hand and pointed it at Mr. Martinez. The three men demanded money from him. Mr. Martinez put his hand in his pocket and gave them all the money he had, three dollars. When told that Mr. Martinez didn't have any more one of the men said "Just shoot him" Mr. Martinez testified that petitioner shot him in the neck. The court noted a new scar extending from four inches below Mr. Martinez's left ear, down around the bottom of the neck and up the right side to about the same spot (H. 3-6).*

After the shooting Mr. Martinez grabbed his throat and ran toward 163rd Street where a grocery store was open. Men who were standing in front of the store put him in a cab and brought him to Lincoln Hospital (H. 6).

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* Parenthetical numbers preceded by "H" refer to the minutes of the pre-trial hearing.

When first brought to the hospital, Mr. Martinez was placed in a stretcher and brought to a surgical room. Prior to losing consciousness he responded to questioning by two uniformed police officers. He testified that he told the police officers that he thought he knew his assailant, gave them a nickname "Frankie", and a description (H. 7-8, 22).

After the operation he was questioned a second time by two detectives. Unable to speak, he communicated by blinking his eyes: one blink signified "yes", two meant "no". In this manner he confirmed his previous description, said the perpetrator wore a black jacket and, in addition, drew a diagram of where "Frankie" lived, pointing to the building and indicating that Frankie's apartment was on the fifth floor (H. 8-11, 15).

The complainant testified that he himself had lived in the same building when he was seventeen, that approximately six months before the shooting he had been introduced to Frankie and had subsequently seen him in the neighborhood on four to six occasions (H. 11-14).

The complainant testified that the detectives returned to the hospital approximately two and one-half hours after leaving, asked if he recognized anyone in the room, Mr. Martinez said yes, pointed to petitioner and indicated that he was "Frankie, the guy who shot me" (H. 16).

DETECTIVE RAYMOND KERINS testified that on May 28, 1972 he worked an 8 a.m. to 4 p.m. tour of duty. At 9:30 a.m., he went to Lincoln Hospital for a report on a man who had been shot during an attempted robbery (H. 40). At the hospital, Detective Kerins was told that Mr. Martinez couldn't speak, that he was in critical condition and that there was a possibility of the complainant dying within a few hours (H. 41, 44).

After assuring himself of the complainant's ability to understand him, Detective Kerins questioned Mr. Martinez about the description, nickname and location of the perpetrator. The complainant acknowledged that one of the perpetrators was known as "Frankie" and that he lived on 162nd Street and Prospect Avenue (H. 41-42).

After picking up a third officer the detectives proceeded to the address obtained from the complainant (H. 42). They first spoke to the superintendent of the building who told them that a person by the name of "Frankie" lived on the fifth floor. On the fifth floor the detectives found a long hallway leading to several rooms. In one room, to which the door was open, the detectives saw three male hispanics drinking wine. Asked if any of them was "Frankie" the three men responded in the negative. Detective Kerins took the oldest man in another room and asked him if any of the men was Frankie. The man then described petitioner to him. Detective Kerins then took the third man outside and inquired as to which of the two others was Frankie. He gave the same description as the first man. Detective Kerins then returned to the room, told "Frankie" he was under arrest and handcuffed him. Detective Kerins identified petitioner as "Frankie" (H. 43-44).

After handcuffing petitioner, Detective Kerins advised him as to his Miranda rights. He advised petitioner of his right to remain silent, to refuse to answer and warned that anything he said could be used against him. Petitioner

was also advised that he could have an attorney present at any time and that if he couldn't afford an attorney one would be provided free of charge. Detective Kerins testified that petitioner acknowledged full understanding of his rights (H. 45-47; 57-58).

Detective Kerins then asked petitioner if he wanted to proceed at that time, petitioner did not answer. He never indicated that he wanted to consult with an attorney or to invoke his right to remain silent. Detective Kerins than asked petitioner again if he understood his rights. Petitioner answered that he did understand them. Asked if he wanted to proceed, petitioner said something like "You are doing the talking" and "what do you want to talk about" (H. 46-47, 57-59).

According to the witness, when petitioner asked where the gun was, he answered "I don't know". After a search of the apartment the detectives took petitioner to the hospital where Mr. Martinez identified him (H. 47).

Petitioner was then taken to the 43rd precinct where Detective Kerins took out the Penal Law and advised petitioner as to his potential criminal liability for Attempted Murder, Attempted Robbery and Possession of Weapons (H. 47, 60). Detective Kerins further testified that he told petitioner that if he wanted to help himself and give up the gun the police would bring it to the attention of the D.A. and the judge, although he made it clear that no promises were made. The witness testified that his main purpose was to get the gun off the street (H. 48).

Detective Kerins testified as to the effect on petitioner of his offer to speak on petitioner's behalf:

> "The whole effect he got out of it, Your Honor, was that he had did so much time, and he has been around so much that it didn't matter to him" (H. 63).

After several minutes petitioner said "if I give up the gun, I will blow my whole case (H. 48, 61). During the ensuing conversation petitioner commented that he was a Puerto Rican, that during all the time he served in jail he had never given up anyone, and that the complainant was a Puerto Rican and would not show up in court" (H. 48, 61).

Detective Kerins testified that the entire conversation occurred during the processing of the petitioner which lasted 30-45 minutes (H. 63).

The defense called no witnesses.

Concerning the motion to suppress statements made by petitioner while in police custody, the court denied defendant's motion, holding:

> "[T]he Court finds that Detective Kerins did in fact give defendant his rights re remaining silent, and the Court finds that the defendant did understand those admonitions or rights and I find that the statement in addition and/or declaration were voluntary beyond a reasonable doubt. People have met their burden of proof re the statements were voluntary" (H. 119-120).

(2) Trial/Plea

On June 7, 1973 after the selection of three jurors, petitioner offered through counsel to withdraw his plea of not guilty and enter a plea of guilty to the crime of Assault

In The First Degree in full satisfaction of the pending indictment. After determining that the plea was knowingly and voluntarily entered, the court accepted the plea (P. 141-147).*

(3) Sentence

On June 28, 1973, Justice Sullivan, aided by a probation report sentenced petitioner to an indeterminate term of imprisonment not to exceed ten years.

(4) Appeal

An appeal was taken to the Appellate Division, First Department. On appeal petitioner contended that the trial court improperly denied his motion to suppress the statements he made while in police custody because the People failed to prove beyond a reasonable doubt that it represented a voluntary waiver of his right to remain silent.

The Appellate Division unanimously affirmed the conviction on February 11, 1975. Leave to appeal to the Court of Appeals was denied on March 18, 1975 (Wachtler, J.).

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* Parenthetical numbers preceded by "P" refer to the minutes of trial/plea. The right to maintain federal habeas corpus despite the guilty plea was upheld in Lefkowitz v. Newsome, 420 U.S. 283 (1975) by a closely divided court. We continue to believe the ruling was erroneous.

B. Federal Court

Petitioner then sought a federal writ of habeas corpus by petition sworn to May 2, 1975. In this petition, Mr. Garcia urged that he was never properly advised of his rights to remain silent and to the presence of counsel and that he did not voluntarily waive his right to remain silent.

On December 11, 1975 the United States District Court for the Southern District of New York (Brieant, J.) rendered a detailed reasoned decision denying petitioner's application and dismissing the petition.

The court ruled that the evidence adduced at the pre-trial hearing on petitioner's motion to suppress supported the state court's finding that petitioner's statement were voluntarily made and noted that petitioner's response to the police officer's inquiry as to whether he wished to proceed "does not constitute a refusal to answer questions. To the contrary, it would seem to be a solicitation of further questions". (Appellant's Appendix, p. 8).

POINT I

THE DETERMINATION OF THE STATE COURT MADE AFTER A FULL HEARING ON THE MERITS OF PETITIONER'S MOTION TO SUPPRESS IS ENTITLED TO A PRESUMPTION OF CORRECTNESS IN ACCORDANCE WITH 28 U.S.C. § 2254(d)

After a pre-trial suppression hearing the State court found that petitioner was advised of his rights, that he understood these rights and that the statements he made were voluntary beyond a reasonable doubt. Pursuant to 28 U.S.C. § 2254(d), the factual findings of the state court should be presumed correct in a federal habeas corpus proceeding, unless appellant has set forth any allegations which would bring the petition within the statutory exceptions which negate presumption. LaVallee v. Delle Rose, 410 U.S. 690 (1973); Mapp v. Warden, ____F. 2d_____ (Docket No. 75-2119, Slip Op. at 2675)(2d Cir. March 16, 1976); United States ex rel. Sabella v. LaFollette, 432 F. 2d 572, 574 (2d Cir. 1974), cert. den. 401 U.S. 920; United States ex rel. Preston v. Mancusi, 422 F. 2d 940 (2d Cir. 1970). The burden is on petitioner to establish by convincing evidence that the factual

determination of the state court is erroneous. United States ex rel. Stanbridge v. Zelker, 514 F. 2d 45 (2d Cir. 1975) cert. den. 44 U.S.L.W. 3205 (October 6, 1975); United States ex rel. Regina v. LaVallee, 504 F. 2d 580 (2d Cir. 1970) cert. den. 420 U.S. 947. Petitioner may not merely seek a re-examination of facts already probed by the state court. United States ex rel. Stanbridge v. Zelker, supra. Petitioner has not established that the state court's factual determination was erroneous or that any of the statutory exceptions to 28 U.S.C. § 2254(d) apply here.

Petitioner has had a full and fair hearing, at which he was represented by counsel, and which resulted in reliable findings by the state court, which are supported by the record.

In this regard it should be noted that the state court applied the much stricter standard of "beyond a reasonable doubt" rather than the preponderance of the evidence standard determined necessary by the United States Supreme Court. Lego v. Twomey, 404 U.S. 477 (1972).

Petitioner has received an evidentiary hearing in the state court and is not entitled to a second hearing in the federal court or to any change in the state court decision.

POINT II

PETITIONER'S MOTION TO SUPPRESS STATEMENTS WAS PROPERLY DENIED

The testimony at petitioner's pre-trial suppression hearing reveals that Detective Kerins arrested petitioner, advised him of his Miranda rights* and that petitioner acknowledged his understanding of each of these rights. Petitioner was asked if he wanted to proceed. Since petitioner failed to give any response, Detective Kerins once again asked petitioner if he understood his rights. After petitioner indicated that he understood them he was asked if he wanted to proceed. Rather than give a negative answer, he replied in essence "You're doing the talking" and "what do you want to talk about". Detective Kerins, concerned about getting the gun off the street, sought to question petitioner concerning the location of the weapon. Rather than invoke his right to remain silent petitioner twice denied any knowledge of the gun.

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* Miranda v. Arizona, 384 U.S. 436 (1966).

Once petitioner acknowledged that he understood his rights and elected not to invoke them by voluntarily replying to questions, further responses could be elicited.

> "While police interrogators must faithfully carry out Miranda's mandate at the threshold, they may then proceed to elicit responses, however, incriminating, without further specific warning". United States v. Gorman, 380 F. 2d 58 (1st Cir. 1967).

Petitioner was taken to the hospital to be identified by the victim, a procedure necessitated by the fact that Mr. Martinez was in critical condition and there was a distinct possibility of his death within a few hours. Petitioner was then brought to the police station. During the processing procedure which took approximately 30 minutes, petitioner, in response to questioning about the gun replied "If I give up the gun, I will blow my whole case".

Petitioner claims that the failure of the interrogating officer to repeat the Miranda warnings prior to questioning at the stationhouse rendered his statement involuntary and his conviction invalid. This claim is premised on petitioner's contention that prior to questioning at the stationhouse he has invoked his right to remain silent.

However, the record clearly indicates otherwise and supports the state court's finding of admissibility. Petitioner never invoked his right to silence, nor did he ever request the presence of counsel. Rather than invoke his rights petitioner spoke to the officer, stating "You're doing the talking" and "what do you want to talk about". As the court below noted "such a response does not constitute a refusal to answer questions. To the contrary, it would seem to be a solicitation of further questions" (Appellant appendix, p. 8). Subsequent statements are not invalid because warnings are not given each time questioning is resumed after interruption and there is no requirement that an accused be continually reminded of his rights once he has intelligently waived them. Biddy v. Diamond, 516 F. 2d 118, 122 (5th Cir. 1975); Evans v. Swenson, 455 F. 2d 291, 296 (8th Cir. 1972); Maguire v. United States, 396 F. 2d 327 (9th Cir. 1968) cert. den. 393 U.S. 1099 (1968), (warnings 3 days earlier sufficient); Miller v. United States, 396 F. 2d 492 (8th Cir. 1968) cert. den. 393 U.S. 1031;

Gorman v. United States, supra; Tucker v. United States, 375 F. 2d 365 (8th Cir.) cert. den. 389 U.S. 888 (1967); United States v. Hopkins, 433 F. 2d 1045 (5th Cir. 1970); United States v. Osterburg, 423 F. 2d 704, 705 (9th Cir. 1970) cert. den. 399 U.S. 914; Moore v. Hopper, 389 F. Supp. 931, 933 (M.D. Ga. 1974); United States v. Kinsey, 352 F. Supp. 1176, 1178 (E.D. Pa. 1972); People v. Hill, 39 Ill. 2d 125, 233 N.E. 2d 367 (1968); State v. Magee, 52 N.J. 352, 245 A. 2d 339 (1968) (warnings 2 1/2 days earlier held sufficient).*

Petitioner urges that his ability to render a knowing and voluntary statement was overborne by the hospital identification, Detective Kerins' offer to speak in his behalf and the reading of the Penal Law. However, the record fails to substantiate petitioner's allegations of coercion. While

* The cases relied upon by petitioner are inapposite since those cases deal with the issue of whether a defendant who has invoked his rights may execute a waiver at a subsequent time without new warnings and not with the situation of a defendant who has been given his rights and waived them. Thus, cases which have held that renewed Miranda warnings are required before the reinterrogation of an accused who had indicated a desire to remain silent have no bearing on the instant case for "here, the appellant had given no such indication", United States v. Gaynor, 472 F. 2d 899, 900 (2d Cir. 1973), and "the record does not show that the agents ignored any request of [appellant]"; United States v. Collins, 462 F. 2d 792, 796 (2d Cir. 1972).

he noted that giving up the gun would blow his whole case, he remained steadfast in his decision not to discuss the location of the gun. He never did give up the gun or tell the police where it was. The conduct of the police was not inherently coercive nor is there any indication that petitioner felt compelled to speak under the circumstances. He was not subjected to intimidating police conduct or mistreatment of any kind so as to undermine his will. See United States v. Masullo, 489 F. 2d 217 (2d Cir. 1973); United States v. Ramirez, 482 F. 2d 807, 815 (2d Cir. 1973), cert. den. 414 U.S. 1070; United States v. Wallace, 272 F. Supp. 841 (S.D.N.Y. 1967); United States v. Melville, 309 F. Supp. 745 (S.D.N.Y. 1970).

Indeed this Court has twice held that proper warnings have insulated a subsequent confession from the effect of a prior illegally obtained statement on the grounds that compelling pressures were absent. United States v. Knight, 395 F. 2d 971 (2d Cir. 1968); United States v. Gorman, 355 F. 2d 151 (2d Cir. 1965). See also, United States v. Bayer, 331 U.S. 532 (1947); Lyons v. Oklahoma, 322 U.S. 576 (1944); United States v. Trabucco, 424 F. 2d 1311 (5th Cir. 1970) cert. den. 399 U.S. 918; United States v. Pomares, 499 F. 2d 1220 (2d Cir. 1974); Mathis v. Nelson, 411 F. 2d 1363 (9th Cir.) cert. den. 397 U.S. 1028 (1969).

Detective Kerins' offer and reading of the Penal Law constituted no more than an exhortation that petitioner re-evaluate his decision not to reveal the location of the gun and is not prohibited:

> "Miranda was [not] meant to prohibit police offers from ever asking a defendant to reconsider his refusal to answer questions. So to hold would be tantamount to enacting a 'no questioning' rule once a suspect was in custody. Such a rule finds no support in the Fifth Amendment nor, fairly read, in Miranda itself, nor in common sense". United States v. Collins, supra at 797.

Moreover, informing an accused of his potential criminal liability and offering to speak on his behalf if he cooperates with authorities are not such inherently compelling pressures as to render petitioner's statements voluntary. United States v. Pomares, supra; United States v. Ferrara, 377 F. 2d 16 (2d Cir. 1967) cert. den. 389 U.S. 908 (1967).

In fact, when Detective Kerins was asked during cross-examination, to describe petitioner's reaction to the offer to speak on his behalf, Detective Kerins replied:

> "The whole effect he got out of it, Your Honor, was that he did so much time, and he has been around so often that it didn't matter" (H. 63).

Further, as noted earlier, he never did reveal the location of the gun.

Under the "totality of the circumstances", United States v. Watson, 44 U.S.L.W. 4112 (Jan. 27, 1976); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Greenwald v. Wisconsin, 390 U.S. 519 (1968), it is clear that petitioner waived his rights and that his statement was admissible. Petitioner made an intelligent choice with respect to his response to police requests to reveal the location of the gun. He kept saying "no".

In sum the record establishes that petitioner's statements were knowing and voluntary. He was properly advised of his Miranda rights and acknowledged his understanding of these rights, particularly that he need not proceed in the absence of counsel. Further, petitioner, whose statements revealed numerous conflicts with the law* and thus who was sufficiently knowledgeable to make the waiver judgment, never sought to invoke his right to remain silent nor to the presence of an attorney. Far from supporting his allegations of coercion, the record indicates a willingness on petitioner's part to speak to police officers.

> "This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut-off questioning either by

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* Petitioner told Detective Kerins:
"I'm a Puerto Rican and all my time in jail I have never given up anyone" (H. 48, 61).

refusing to discontinue the interrogation upon request, or by persisting in repeated efforts to wear down his resistence and make him change his mind". Michigan v. Mosley, 44 U.S.L.W. 4015, 4016 (December 9, 1975).

Thus, the state court propery denied petitioner's motion to suppress.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE AFFIRMED IN ALL RESPECTS

Dated: New York, New York
April 30, 1976

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARY KO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellee herein. On the 28th day of April , 1976, she served 2 copies of the annexed upon the following named person :

WILLIAM J. GALLAGHER, ESQ.
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Attorney in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Mary Ko

Sworn to before me this
28th day of April , 1976

Rhonda Pinchard Bayer
Assistant Attorney General
of the State of New York